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Supreme Court of the United States

No. 694, October Term, 1970

HERBERT CLAY ----------PETITIONER

V.

COMMONWEALTH OF KENTUCKY ----------RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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HERBERT CLAY ----------*PETITIONER*

V.

COMMONWEALTH OF KENTUCKY ----------*RESPONDENT*

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. Whether the question of the adequacy of Kentucky's postconviction remedy was raised or decided in the court below so as to give this court jurisdiction; if so, whether the question is no insubstantial as not to warrant review by this court.

II. Whether the question of alleged foreclosure of a constitutional issue by failure to appeal was raised or decided in the court below so as to give this court jurisdiction; if so, whether on the basis of the record the question is so insubstantial as not to warrant review by this court.

III. Whether the question of alleged failure of the state to disclose evidence is so insubstantial as not to warrant review by this court when it is undisputed that the petitioner had knowledge of the evidence before the conclusion of trial at a time when it could have been presented to the jury.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner does not state what constitutional provision is involved, but it appears that he relies on the Fourteenth Amendment provision that no state shall "deprive any person of . . . liberty . . . without due process of law."

STATEMENT

Petitioner was sentenced to life imprisonment for willful murder after a trial by jury. Denial of his application for post-conviction relief based on the alleged failure of the state to disclose evidence was affirmed by the Court of Appeals of Kentucky on the ground that the record showed the evidence was disclosed in time for it to be of value to petitioner at trial. *Clay v. Commonwealth*, Ky., 454 S.W.2d 109 (1970); Appendix to Petition, pp. 21-23.

Petitioner admitted at trial that at the time of the shooting he was carrying a 45 automatic cocked under his belt, and that the decedent was shot with that gun (Transcript of Evidence, hereafter TE, pp. 28-34). The only eyewitness, one Mae Whitus, testified that petitioner pulled the decedent out of petitioner's car, shoved him up against another person who had been in the car and shot him (TE 2-10). She also testified that the decedent was unarmed and was "doing nothing" to petitioner at the time of the occurrence (TE 4). Petitioner testified the shooting resulted from accidental discharge of his cocked automatic during a struggle to remove the decedent from his car (TE 26-33).

During presentation of defense evidence, petitioner attempted to introduce results of a Kentucky State Police blood test concerning blood found in the car, but the evidence was excluded, apparently because the integrity of the sample was not properly established (Transcript of Record, hereafter TR; p. 19; (TE 39, 40). Although the petitioner subsequently called two other witnesses during the presentation of his case, no further attempt was made to authenticate the blood test evidence, nor was any request made for additional time to produce such evidence (TE 40-44).

In this proceeding, petitioner seeks review on certiorari of the denial of post-conviction relief by the Kentucky Court

of Appeals. His sole contention there was that the state failed to disclose evidence, and no contention was made concerning the adequacy of Kentucky's post-conviction relief procedure or the failure of petitioner to take a direct appeal.

ARGUMENT

I. THE QUESTION OF THE ADEQUACY OF KENTUCKY'S POST-CONVICTION RELIEF PROCEDURE WAS NOT RAISED OR DECIDED BELOW SO AS TO GIVE THIS COURT JURISDICTION; IN ANY EVENT, THE PROCEDURE IS PATENTLY ADEQUATE AND THE QUESTION IS SO INSUBSTANTIAL AS NOT TO WARRANT REVIEW BY THIS COURT.

Rule 23-1(f) of the Rules of this Court specifically requires that if review of a judgment of a state court is sought, the petitioner "shall . . . specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." It is well settled that a question must be actually raised and decided in a state court in order to give this Court jurisdiction to review it on certiorari. *Adelman v. California*, 344 U.S. 357 (1953); *Beck v. Washington*, 369 U.S. 541, 553-54 (1962); *Maxwell v. Newbold*, 18 How. (U. S.) 511 (1856); Annotations, 100 L.ed. 1200 (1956), 84 L.ed. 925, at 935 (1940). It is clear that the prerequisites to certiorari jurisdiction have not been met on this point.

In any event, Kentucky's post-conviction procedure is clearly adequate. In 1963, the Kentucky Court of Appeals broadened the scope of review under post-conviction remedies so as to coincide with federal habeas corpus. *Rice v. Davis*, Ky., 366 S.W.2d 153 (1963). Effective January 1, 1963, the Kentucky Court of Appeals adopted Kentucky Rule of Criminal Procedure 11.42, (hereafter RCr 11.42), set out in full in its present form in the Petition (pp. 2-4), which is "comparable with the remedy provided federal prisoners by 28 U.S.C., § 2255," *Jones v. Davis*, 336 F.2d 594 (6th Cir. 1964), and "is intended to provide a more satisfactory form of remedy . . . than is practicable under habeas corpus." *Ayers v. Davis*, Ky., 377 S.W.2d 154 (1964). Federal courts have consistently refused to entertain habeas corpus petitions until the remedy under Kentucky's rule has been exhausted. *Gray v. Wingo*, 391 F.2d 268 (6th Cir. 1967); *Weigand v. Wingo*, 380 F.2d 1022 (6th Cir. 1967); *Jones v. Davis*, supra; *Nolan v. Thomas*, 230 F.Supp. 114 (W.D.Ky. 1964).

Under the rule, a prisoner is afforded "full and fair opportunity to litigate" his claims, including "the bare essentials" of (1) effective assistance of counsel; (2) a hearing, (3) resolution of material facts; (4) a transcript of the record in the event of an appeal; and (5) an appeal. *Coles v. Commonwealth*, Ky., 386 S.W.2d 465 (1965). As stated by the Court of Appeals of Kentucky in directing that a habeas corpus proceeding be construed as an RCr 11.42 motion and that a hearing be held, the post-conviction remedy under the rule "is constitutionally adequate if the trial courts adequately apply it." *Schroader v. Thomas*, Ky., 387 S.W.2d 312 (1965). That Court readily compels trial courts to comply with the rule by the extraordinary remedy of mandamus. See, for instance, *Brummett v. Knuckles*, Ky., 409 S.W.2d 807 (1966); *Bingham v. Stivers*, Ky., 396 S.W.2d 800 (1965).

Finally, the Kentucky Court of Appeals readily follows precedents of this Court in the application of the rule. See, for instance, *Stinnett v. Commonwealth*, Ky., 446 S.W.2d 292 (1969), adopting *Rodriquez v. United States*, 395 U.S. 327 (1969), and overruling earlier Kentucky precedents to the contrary.

Petitioner candidly cites numerous Kentucky cases in which the remedy was applied to enforce federal constitutional rights, but relies on *Collier v. Commonwealth*, Ky., 387 S.W.2d 858 (1965), and subsequent cases relating to the nonreviewability of search and seizure questions under the rule, to support his conclusion that the rule is inadequate. We think it sufficient to note that the federal cases fairly relied on by Kentucky in *Collier* are no longer authoritative in view of *Kaufman v. United States*, 394 U.S. 217 (1969), and that *Kaufman* has not yet been considered by the Court in that regard. We have no doubt it will be readily followed when it is considered, just as was *Rodriquez*.

Apparently, petitioner's greatest reliance in this connection is on his failure to obtain relief in this proceeding. His disagreement with the Kentucky Court of Appeals on its decision in a single case, particularly his own, scarcely demonstrates the inadequacy of the remedy. Moreover, adequate reason for the result in this case will be demonstrated hereinafter.

II. THE ALLEGED FORECLOSURE OF THE CONSTITUTIONAL QUESTION BY FAILURE TO APPEAL WAS NEITHER RAISED NOR DECIDED IN THE STATE COURT SO AS TO GIVE THIS COURT JURISDICTION; THE QUESTION ON THE INSTANT RECORD IS SO INSUBSTANTIAL AS NOT TO WARRANT REVIEW BY THIS COURT.

In the court below, the state did not claim and the court did not decide that the failure to appeal foreclosed the federal constitutional issue. The state contended, and the court decided, that the allegations of failure to disclose evidence in light of the undisputed record which showed it was available to petitioner at trial were insufficient to establish a federal constitutional violation under decisions of this Court. 454 S.W.2d at 109-10; Appendix to Petition, second last full paragraph, p. 22. The subsequent observation of the court that it would not review the point on the question of whether it was a trial error (short of constitutional proportions) was simply a reflection of its past decisions, consistent with those under 28 U.S.C. § 2255, that post-conviction review under Kentucky's rule does not extend to claims of ordinary trial errors short of constitutional proportions. The cases cited by the court in its last full paragraph so indicate.

Thus, it is clear from the record and the opinion of the court that petitioner's constitutional claim was rejected because the alleged suppressed evidence was known to him at trial. He filed no petition for rehearing and no question was presented or decided as to whether the failure to appeal foreclosed the *constitutional* claim.

Therefore, certiorari should be denied on this point (1) because petitioner's contention completely misconstrues the holding of the court below; and (2) because his contention was neither raised nor decided below. See the cases cited under our first argument.

III. THE ALLEGED FAILURE TO DISCLOSE EVIDENCE IS SO INSUBSTANTIAL AS NOT TO WARRANT CERTIORARI WHEN IT IS UNDISPUTED THAT PETITIONER HAD KNOWLEDGE OF THE EVIDENCE BEFORE CONCLUSION OF THE TRIAL.

Petitioner advances the contention that the prosecution in the case at bar "*suppressed* weighty scientific evidence which would have both discredited the testimony of the state's key witness and corroborated that of the petitioner." (Petition, p. 15). (Emphasis added.) This is a misleading and incorrect statement. As petitioner admits, trial counsel for petitioner learned of the results of the blood sample test *during the course of trial.* (Petition, p. 15). The trial had *not* been concluded, after which the petitioner learned of suppressed exculpatory evidence, as in the cases cited by petitioner. *Giles v. State of Maryland,* 386 U.S. 66 (1967), *Brady v. State of Maryland,* 373 U.S. 83 (1963). The jury had *not* retired to consider the evidence and return a verdict, as in *Hamric v. Bailey,* 386 F.2d 390 (4th Cir., 1967). As to whether there was a suppression of the evidence favorable to the accused, the Court in *Hamric* said:

> "Finally, on the issue of suppression, we conclude that disclosure of the undisclosed evidence *after the jury had retired* was too late to overcome the requirements of Brady. If it is incumbent on the state to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused. Possibly the jury's deliberations could be interrupted for the purpose of taking additional testimony, but the potential prejudicial effect to an accused of such an extraordinary procedure persuades us that *Brady,* to be given vitality, must be interpreted to require disclosure, at least, *before the taking of the accused's evidence is complete.*" 386 F.2d at 393. (Emphasis added.)

In *United States v. Manhattan Brush Co.* 38 F.R.D. 4 (1965), the Court in discussing the requirements of *Brady v. Maryland,* supra, said the following:

> "The *Brady* decision must be understood to refer to the application of tests of fairness to the prosecu-

tion *at trial, and not at an earlier point in the proceedings.*" 38 F.R.D. at 6. (Emphasis added.)

In the case at bar, petitioner had knowledge of the test and its results during the course of the trial, and before the completion of the taking of the accused's evidence. It cannot be said this disclosure was too late to be "of value to the accused." Petitioner argues that the case at bar is analogous to *Giles* and *Brady*. Upon fair analysis, those cases are clearly distinguishable because the evidence involved was *suppressed* and *unknown* through trial. Here, there was not only no factual allegation of deliberate suppression, but rather the test result was actually known to petitioner before conclusion of his evidence.

Petitioner quotes from *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964) (Petition, p. 6):

> "It is no answer that Barbee's attorney failed to ask for the results of the tests. While a diligent defense counsel *might have learned* about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial." (Emphasis added.)

Again that case is clearly distinguishable because the plain unarguable fact is that petitioner *had learned* of the results of the blood sample test at trial.

Petitioner cites no cases which are directly in point with this one. We wholeheartedly agree with the Court's holding in those cases cited by petitoner as instances where the accused was not afforded due process of law because he was deprived at trial of exculpatory evidence through deliberate suppression by the prosecution. This is simply not such a case. It appears, rather, that the evidence was excluded because of failure to establish a proper foundation. Whatever the reason, one thing is absolutely clear and dispositive: the

evidence was *known* to petitioner and it was not through concealment by the prosecution that it was excluded. No suggestion was made at trial to the contrary, nor was there any request for additional time.

In an apparent effort to overcome this shortcoming in his constitutional contention, petitioner makes some oblique reference to the fact that there was no direct appeal. (Petition, p. 7, n., p. 17.) The simple answer to that is that petitioner's post-conviction motion was filed by his Kentucky counsel who represents him in this Court. We have no hesitation in saying that his diligent and scholarly Kentucky counsel would have included such a claim of denial of appeal, had there been any. He failed to do so (TR 14-18), and there is of course no justification for assuming or speculating such a denial at this late date. If such be the case, the denial may be rectified in a timely and proper manner through the same post-conviction procedure petitioner so vigorously deprecates in this Court. See *Stinnett v. Commonwealth*, supra.

This aspect does explain why the Kentucky Court of Appeals deemed it appropriate to observe that no such appeal was taken and that there was no occasion to treat the complaint as it might be treated on a direct appeal. It was consideration of this question of competency of trial evidence which was barred by failure to take a direct appeal.

The long and short of this case is that petitioner seeks to convert an ordinary question of admissibility of trial evidence into a constitutional question by couching it in terms of *concealment*, contrary to the record, rather than in its actual context of *exclusion* of evidence. Clearly the question thus presented is so insubstantial as not to warrant review on certiorari.

CONCLUSION

The Kentucky Court of Appeals fairly and correctly denied relief on the basis of the record. Petitioner's first two contentions here were neither raised nor decided there, and are without substance in any event. His third contention, which is in effect a question of admissibility of trial evidence, is, like the first two, clearly so insubstantial as not to warrant review on certiorari. The petition should be denied.

Respectfully submitted,

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DATE: November 5, 1970